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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 72-1013

LIONEL JAMES HANNA,

Petitioner,

VERSUS

STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

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TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW 2

STATEMENT OF THE FACTS 2

ARGUMENT 3

TABLE OF CASES

	PAGE
Adjmi v. State (3 DCA Fla.1962) 139 So.2d 179	5
Anderson v. State (2 DCA Fla.1970) 230 So.2d 704	5
Bailey v. Anderson, 326 U.S. 203	6
Chapman v. California, 386 U.S. 18	7
Ferguson v. Georgia, 365 U.S. 570	6
Griffin v. California, 380 U.S. 609	3,7,9
Michel v. Louisiana, 350 U.S. 91	6
Mutual Life Ins. Co. v. McGrew 188 U.S. 291	6
Nations v. State (2 DCA Fla.1962) 145 So.2d 259	5
Waid v. State (Fla.S.Ct.1952) 58 So.2d 146	5
Williams v. Georgia, 349 U.S. 375	6

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QUESTION PRESENTED FOR REVIEW

Whether the decision of a Florida appellate court in the instant case is violative of Petitioner Hanna's Fifth Amendment right against being compelled to testify against himself in a criminal prosecution.

STATEMENT OF THE FACTS

The State of Florida accepts Petitioner Hanna's presentation of the facts to the extent that his presentation is non-argumentative and non-conclusory; however, the State adds the following information. Prior to the prosecutor's comments at issue in this case, the defense counsel argued in his own closing argument to the jurors in the following terms,

> "Now, we have these Courts by the citizens from all over the County and you hear all the evidence and so forth, their sworn testimony. But here all you have is the State's case, . . ." (TT 417)

ARGUMENT

The precise question now before the United States Supreme Court is whether a Florida appellate court in affirming Petitioner Lionel J. Hanna's criminal conviction in state court violated the Fifth-Amendment principles set forth in Griffin v. California, 380 U.S. 609, thereby creating a substantial federal question authorizing a grant of certiorari review by the United States Supreme Court. The proper answer to that question is in the negative.

To begin with, there were certain procedural grounds warranting the state appeals court in affirming Petitioner Hanna's conviction: procedural reasons sustained by common sense about jurors and defense lawyers. It should be noted that on both occasions when the prosecutor made the objected-to remarks the defense lawyer immediately interposed his objection and stated the express grounds for his objection in the presence of the jurors. The defense counsel did not object, request the jurors be removed, and then give the grounds for his objection outside their presence. Instead, he twice objected and then commented immediately in their presence about improper reference to his own client's "failure to take the

stand." From Petitioner Hanna's point of view the two prosecutor remarks were, at best, "indirect" comments on the defendant's exercise of his Fifth Amendment right not to testify. Yet, the defense attorney's own statements in the jurors' presence were clear and direct references to, "the defendant's failure to take the stand."

The accused's lawyer moved only for a mistrial in this case -- he did not seek corrective jury instructions (though he got corrective instructions anyway). It was the State's position in the state appeals court below, and is its position before this court now, that when an accused himself emphasizes to the jurors the fact he failed to take the stand then he is without a valid basis for receiving a mistrial on grounds of the prosecutor's remarks, but is properly limited only to a corrective jury instruction. Obviously the accused has no right to augment the error and then rely upon that augmented error for an immediate mistrial.

Indeed, by failing to excuse the jurors before arguing the specific grounds for his objections the defendant failed to show good faith in tendering his objections and affirmatively demonstrated he did not consider such remarks to be incurable once heard by the jurors.

Along this same line of reasoning it is noted that during his own closing argument, prior to the prosecutor's remarks, the defense lawyer said to the jury,

> "Now, we have these Courts by the citizens from all over the County and you hear all the evidence and so forth, their sworn testimony. But here all you have got is the State's case, . . ." (TT 417)

This was just as much a comment on the accused's failure to testify as were the prosecutor's statements. So the accused himself had highlighted the fact before the prosecution ever approached the subject.

Florida case law holds that where defense counsel himself comments on an accused's failure to testify in such a way as to invite similar remarks by the prosecutor, the accused can not complain of the prosecutor's comments on appeal, cf., Waid v. State (Fla.S.Ct.1952) 58 So.2d 146; Nations v. State (2 DCA Fla.1962) 145 So.2d 259; Adjmi v. State (3 DCA Fla.1962) 139 So.2d 179, at 186-187; and Anderson v. State (2 DCA Fla.1970) 230 So.2d 704.

The State of Florida suggests the preceding facts and authorities constitute an independent procedural ground which the state appeals court properly may have used to affirm

Petitioner Hanna's conviction -- even assuming the prosecutor's remarks were violative of Mr. Hanna's Fifth Amendment rights. And this United States Supreme Court has recognized that rulings of state courts based upon independent state procedural grounds properly may reduce what otherwise would be a substantial federal question to something less than a substantial federal question, cf., Ferguson v. Georgia, 365 U.S. 570, 572. Consequently, the instant case involves something less than a substantial federal question, so issuance of the writ of certiorari is unwarranted and beyond the court's jurisdiction. See: Williams v. Georgia, 349 U.S. 375, 382-383; Michel v. Louisiana, 350 U.S. 91, 97: Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 309: Bailey v. Anderson, 326 U.S. 203, 206-207.

Viewing the case from an entirely different perspective, the prosecutor's remarks should be seen as harmless error beyond a reasonable doubt. The prosecutor's comments said nothing and implied nothing to the jurors that had not been pointed out by defense counsel to the jury already. The prosecutor's comments were at best -- or at worst -- a repeat of a point already made by the defense counsel in his own closing argument. The comments were, therefore, totally harmless. Constitutional error which the

record shows to have been harmless beyond a reasonable doubt does not require automatic reversal of a criminal conviction. The Supreme Court so held in Chapman v. California, 386 U.S. 18. That principle is controlling in this case: so, again, the writ of certiorari need not issue because the cause presents no substantial federal question.

Also, the State of Florida notes that in Griffin v. California, supra, which is the decision Petitioner relies upon to document existance of a substantial federal question, the Supreme Court reversed a conviction that California reviewing courts had allowed to stand in a criminal case where at trial the prosecutor commented specifically and extensively on the accused's failure to testify, and the trial judge in his instructions commented on the same fact, instructing the jurors they could draw reasonable inferences from the accused's failure to explain or deny evidence against him. The United States Supreme Court said of the California appellate decision under review,

> "It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is

made as in other situations; but the prosecutor's comments and the court's acquiescence are the equivalent of an offer of evidence and its acceptance.

Griffin v. California, supra, at 612.

The Supreme Court then wrote,

"For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," Murphy v Waterfront Comm'n, 378 US 52, 55, 12 L ed 2d 678, 681, 84 S Ct 1594, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. People v Modesto, 62 Cal 2d 436, 452-453, 398 P2d 753, 762, 763. What the jury may infer, given no help from the court, is one thing. What it may infer when

> the court solemnizes the silence of the accused into evidence against him is quite another."
>
> Griffin v. California, supra, at 614.

The present case is distinguishable from Griffin v. California, supra, because in the instant case the trial court in no manner "solemnized" the accused's silence as evidence against him. If anything was done to "solemnize" his silence into evidence, it was done by the accused's lawyer himself in this case, by his once indirect and twice direct references in the jury's presence to "the defendant's failure to take the stand." There is no state action presented in this cause that raises an issue constituting a substantial federal question.

Petitioner Hanna's argument to this court is premised on an assumption that American jurors are irrevocably prejudiced against an accused once it is indirectly brought to their attention by a prosecutor that the accused has invoked his right not to testify. The Griffin decision is a case in which the trial court in some manner solemnized or endorsed such an improper inference where directly argued by the prosecutor. That did not occur here: since in this case the prosecutor's remarks were neither direct nor endorsed by

the court.

Finally, the State of Florida suggests the prosecutor's remarks, prima facie, say nothing that would prejudice the accused's right not to testify against himself, and say nothing that would unfairly prejudice the minds of the jurors against the accused.

CONCLUSION

WHEREFORE, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District has been furnished to Honorable Paul Pollack, Attorney for Petitioner, Pollack, Yocom & Haggard, Suite 100, 1700 N.W. 7th Street, Miami, Florida, by mail this ___ day of March, 1973.

Nelson E. Bailey

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